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Supreme Court, U.S.
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NO: _____

In The
SUPREME COURT OF THE UNITED STATES

SCOTTY DALE HOCKADAY
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR THE WRIT OF CERTIORARI

COUNSEL OF RECORD FOR THE PETITIONER:
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QUESTIONS PRESENTED FOR REVIEW

1. The Petitioner raises the issue of prosecutorial misconduct prejudicing the trial and violating the standards of due process and duty to seek justice, in that:

(A) The State failed to perform an autopsy to connect the death to the injury. The State therefore failed to prove an essential element of the crime charged by omitting to prove the corpus delicti;

(B) The State's decision not to perform an autopsy, violated the Defendant's right to access potentially exculpatory information, in that, when the State represented to the defense that an autopsy had been performed, the defendant relied on this information to provide a defense. When the State finally admitted no autopsy had been performed, the Defendant had no recourse, thus denying him an adequate defense strategy and a fair trial; and

(C) The State prejudiced the minds of the jury by reference to D.U.I. murder, which terminology does not in the exist in the State Code of Alabama.

2. The Petitioner raises the issue of unfair jury selection by striking minority members from the venire without providing a race-neutral reason.

3. The Petitioner raises the issue that his trial was unduly prejudiced in admitting his prior driving record. The Petitioner contends that the admission of a prior driving record, did not go to the intent necessary to commit murder and was more prejudicial than probative.

4. The Petitioner raises the issue of double jeopardy in that he was convicted on the admission of his prior acts and not the acts of the night of December 11, 1993, in violation of his Constitutional right under the Fifth Amendment, not to be convicted twice for the same offense.

5. Did the Defendant engage in conduct that was shocking,

heinous, or outrageous, when the State fail to prove the standard required and thereby raising the issue of undermining due process and prejudicing the minds of the jurors.

6. The Petitioner raises the issue of the chain of custody in the blood evidence being broken in such a manner that the sample used by the State may not have even been the Defendants and thus the evidence used does not meet the empirical standards of scientific evidence necessary to sustain a conviction.

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The Petitioner, Scotty Dale Hockaday, respectfully request that a writ of certiorari be issued to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The Supreme Court of the State of Alabama denying the Writ of Certiorari was entered on February 7, 1997. (App. A)

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254. This is a timely appeal from a Final Judgment from a Writ of Certiorari of the Supreme Court of Alabama, entered on February 7, 1997. The question presented for review is a violation of the Due Process Clause and fundamental fairness in trial proceedings from the decision of the Supreme Court of Alabama

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment rights imposed upon the States through the Fourteenth Amendment provides in relevant parts:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside... and No person shall...be deprived of life, liberty, or property without due process of law...

Alabama Criminal Code § 13A-6 (a)(2)

> A person commits the crime of murder if:
> (1) With inent to cause the death of another
>
> person, he causes the death of that person or of another person; or (2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in

conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

On the evening of December 11, 1993, the Defendant, Scotty Dale Hockaday, crossed into the oncoming lane of traffic and collided with another vehicle carrying three passengers. The passenger in the back seat was a ninety-three year old women, who was taken from the scene of the accident by ambulance to Carraway Hospital, where she later died. The Defendant was charged with 'reckless murder' in violation of Alabama State Code 13A-2-6 (a)(2).

During the February, 1994, session of the Shelby County Grand Jury, the Defendant, Scotty Dale Hockaday, was indicted on the charge of reckless murder. Defendant Hockaday entered a plea of NOT GUILTY and waived arraignment on April 5, 1994. On January 25th through the 27th, 1995, the case was tried by jury before the Honorable Circuit Court Judge Al Crowson, Shelby County, Alabama. Defendant Hockaday was found GUILTY of reckless murder.

A sentencing hearing was held on April 13, 1995, where Defendant Hockaday was sentenced to a term of life imprisonment. A Motion for New Trial was filed on April 27, 1995, and denied on June 20, 1995. Notice of Appeal was given on July 18, 1995.

The Criminal Court of Appeals, case no: CR-94-1948, all judges concurred and affirmed the trial court. A Writ of Certiorari, case no: 1960242, was filed with the Supreme Court of Alabama and denied February 7, 1997. The Petitioner requested and was granted an extension of time by this Honorable Court to file this Writ of Certiorari.

B. BACKGROUND OF THE 1997 DECISION DENYING THE WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

The Petitioner raises the issue of prosecutorial misconduct in that the defense was denied possibly exculpatory evidence of the cause of death. Mr. McInturff, raised this issue before the trial when he was informed that no autopsy had been performed. The State in this instance failed to order or perform an autopsy on the deceased, while it was represented to the Defense Counsel that the autopsy had been performed. (R. 32-33). The Petitioner also contends that the State Prosecutor without the autopsy failed to prove the corpus delicti. "Mr. McInturff: Without the autopsy you can't be sure how she died or what she died of, is that correct, Doctor? Doctor Bilano: That's correct. We base it mainly on clinical grounds." (R. 692-693)

The Petitioner also contends that the State acted improperly by displaying a large folder with the words DUI MURDER, with the petitioner's name below it. In the case at bar, the prosecutor, despite repeated instruction from the Court, displayed a large folder on which were printed foot high letters the words, DUI MURDER, clearly visible to the jury. The Defendant objected. (R.389) On several occasions, the prosecutor was requested to take the folder off counsels' table, which he did, only to later replace the folder in the same position. In addition, the prosecutor verbally referred to D.U.I. murder, knowing that the Code makes no reference to that particular terminology. (R. 451-454)

The Batson violation was raised during the selection of the jury and evidenced by the prima facie case made by the Defense and the State failed to give race-neutral reasons for striking two black jurors. Batson v Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986)

> Court: Okay. For the record, the Court-and I think everybody here is familiar with the fact that Batson applies equally as well to a white defendant-but the Court

finds that the Defendant has failed to make out a case and therefore does deny the Defendant's Batson motion. Mr. McInturf: We except to that. Thank-you Your Honor. (R. 166-167)

The Defendant's Counsel of Record also objected to the State bringing in prior bad acts to prove an element of the alleged crime. The full colloquy is cited on page 10, 11 of this Petition. (R. 178).

The issue of proving outrageous or heinous acts by the Defendant, double jeopardy, and the admission of scientific evidence was objected to and addressed on appeal to the Criminal Court of Appeals and by Writ of Certiorari to the Supreme Court of Alabama. (App. A-2, A-3)

All of the issues presented for review have been timely raised during the proceedings of this case through the trial and appellate levels.

REASONS FOR GRANTING THE WRIT

ISSUE I:

The Petitioner avers and asserts that the District Attorney's office engaged in behavior before and during the trial which amounts to prosecutorial misconduct in that denying the Petitioner in this case, the results of the autopsy, because the State failed to perform one, the Defendant could not properly evaluate and preserve evidence that may have exonerated him. The evidence that an autopsy might have provided is critical to the defense. "Evidence is 'critical' for purposes of due process clause if it could induce a reasonable doubt in the minds of enough jurors to avoid a conviction when that evidence was developed by skilled counsel and experts." White v. Maggio, 556 F.2d 1352, 1357-58 (5th Cir. 1977)

By the time the State acknowledged that no autopsy had been performed, the Defendant had no recourse when Court denied his Motion to Exhume. (R.33).

An autopsy would have allowed the State to adequately prove the cause of death and rule out other reasonable causes of death.

The corpus delicti for murder is (1) a death (2) by unlawful conduct. United States v Russell, 971 F. 2d, 1098. Although circumstantial evidence may afford satisfactory proof of the corpus delicti in a murder case where the evidence excludes every reasonable hypotheses except that of guilt. "The State's evidence did not show that the victim's death was caused only by the criminal agency of another since it did not rule out natural causes or the possibility of medical malpractice." Scanland v State, 473 So.2d 1182,1185 (Ala. Cr. App.), cert denied, 474 U.S. 1035, 106 S.Ct. 602, 88 L.Ed.2d 581 (1985) (citations omitted)

It is the testimony of the attending physician that signifies the importance of the autopsy in the following cross-examination by the defense:

> Mr. McInturff: Doctor, is it safe to say regardless of your death certificate, that you are not certain how this patient died other than the fact she had a heart attack?
> Doctor Bilano: Without an autopsy, sir, we can never be sure. (R. 692-693).

The patient in this case was a ninety-three year old woman, traveling as a passenger in the back of the automobile at the time of the accident. It is the testimony of the Dr. Bilano, that the deceased was given Valium to sedate her, prior to intubation. (R.678) The Doctor also states that he gave the patient Valium for the intubation followed by Atropine[1] and then

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[1]Atropine sulfate: A parasympathdytic agent, it counteracts the effects of parasympathetic Stimulation. It is administered prior to a general anesthetic to inhibit salivation and secretions of the respiratory tract. The use of relatively nonirritating anesthetics had deceased the need for atropine for

Adrenoline Adrnaline, Lidocaine[2] (R. 663) Valium purports to depress the heart rate, while the atropine and adrenaline accelerate the heart rate, this fact alone, could lead the 'reasonable man' to determine that the death could have been due to a cause other than the actions of the Defendant.

The Doctor asserted on direct examination, that the patient incurred massive cardiovascular injuries to her chest. However, on cross-examination, the Doctor stated that the x-rays of the patient proved negative. (R. 678). The Doctor further stated that he "did not know that an autopsy was not done", until the Prosecutor advised him either at trial or shortly before the trial, since he had understood that the County Corner would conduct an autopsy at the funeral home." (R. 674-675) The State's Prosecutor stated "that I wish there had been an autopsy." (R.37)

Without the critical autopsy report, the State failed to prove the 'corpus delicti'. "This complete lack of evidence about what happened to the [driver] meant that the government did not prove a death, the first element of the corpus delicti. Because the government did not establish a corpus delicti, the prosecutor could not fairly argue that [Talley murdered the driver of the car]. By saying that Talley had murdered a man, the prosecutor asserted something as fact that had not been proved, and that was clearly improper. By going outside the evidence, the prosecutor violated a fundamental rule, known to every lawyer, that argument is limited

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that purpose. Taber's Cyclopedic Medical Dictionary, F.A. Davis Co, Philadelphia, 1998

[2]Toxic levels of lidocaine (>5 μg/mL) and/or prilocaine (>6 μg/mL) cause decreases in cardiac output, total peripheral resistance and mean arterial pressure. These changes may be attributable to direct depressant effects of these local anesthetic agents on the cardiovascular system. In the absence of massive topical overdose or oral ingestion, evaluation should include evaluation of other etiologies for the clinical effects or overdosage from other sources
RxList-The Internet Drug Index

to the facts in evidence." Talley v United States, 135 F.3d 291, 197 (internal cites omitted)

The State's expert Dr. Bilano's testimony is insufficient without the critical documentation of the autopsy to establish the cause of death in a murder trial. In failing to provide an autopsy to the defense, the Court left no opportunity to effectively challenge or disprove the alleged cause of death.

The conduct on the part of the State amounts to prosecutorial misconduct. The effect was to greatly prejudice the Defendant. The Petitioner, was denied potentially exculpatory evidence that may have proved his innocence in violation of Brady v Maryland, 373 U.S. 83, 83 S.Ct 11194, 10 L.Ed.2d 215 (1963). The State represented to the Defendant that the autopsy had been performed and would be available. By the time the State acknowledged that no autopsy was done, it was too late for the Defendant to seek a court order to compel and the Court denied the Motion to Exhume, filed on behalf of the Defendant. (R. 33)

This combined failure to perform an autopsy and the State's misrepresentation that the autopsy had been performed, denied the Petitioner to due process, the right to confront the evidence and Constitutional fairness throughout the course of his trial.

The State prejudiced the minds of the jurors by using the terminology printed his folder laid in view of the jury, in which displayed the words DUI MURDER. The misnomer of DUI Murder used by the prosecutor was misleading and infers to members of the jury that the burden on the State is to prove the elements of drunken driving as opposed to the much more difficult burden of showing beyond a reasonable doubt the elements required to show "recklessness". The Court said in Brinegar, that '(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. Brinegar v. United States, 338 U.S. 174.

The elements for Driving Under the Influence are not the

same as the elements for murder under Alabama Statutes. By substituting D.U.I. for reckless, the State , in essence, reduced its burden of proof in the minds of the jury.

The Prosecutor's comment through his large boldly lettered sign, emblazoned with the Defendant's name in bold large letters, was not only prejudicial, but deceptive in its perception to the jury "undermining the fundamental fairness of the trial and contributing to a miscarriage of justice". United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Petitioner Hockaday, only requests that he be provided a fair and unbiased trial as is his right under constitutional guidelines. For the above stated reasons the Petitioner moves this Honorable Supreme Court to review his conviction for murder, to protect and defend the fundamental rights of Scotty Hockaday, under the Constitution of the United States.

ISSUE II:

Petitioner Hockaday, avers and asserts that the State violated the ruling in Batson v. Kentucky, 476 U.S., 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and its progenies, when Juror number 92, Willie Jones and Juror number 94, Keith Andrews, both black males were struck from the jury venire. The Petitioner asserts that the State failed to give a race-neutral reason for striking black members, giving rise to racially motivated discrimination on the part of the prosecutor. The Batson objection was made before the jury was impaneled in the following colloquy:

> Court: Before we get the jury up here are there any motions?
>
> Mr. McInturf: Yes. Sir.
>
> Court: Okay:
>
> Mr. McInturf: Judge, we would have a motion asked on Batson, two strikes, number ninety- two, Your Honor, Loa Jones. We would ask- Willie Jones. We would ask that the State

provide race neutral reasons as to why they struck Mr. Jones. Any answer that would give rise to striking him other than the fact that he is a black male. And I don't think that is-the Defendant is not black, he is white and we would like the Court to question Mr. Jones further concerning the strike by the State. All the answers that he gave were as consistent with the State as they would be on the defense having him on the jury. Also, number ninety- four, Andrew Keith. I'm not seeing anything in his answer at all that would result in him being stricken from the jury, Judge. He did say he was employed, that he could give this Defendant and the State a fair trial. He agreed to the burden of proof on the State. We would ask that the State give race neutral reasons for striking both of these blacks, Your Honor. We ask the State give race neutral reasons.

> Mr. Hillman: The State responds by saying that the Defendant has not made a prima facie case in this case, Judge. We did strike two individuals. They struck two black individuals as well. If that's the case, we can ask for a reverse Batson on the Defense. (R. 166-167)

Once the Batson objection is raised and the prima facie case is made, there is a presumption that the peremptory challenges were used to discriminate. In the present case, the State has the burden of articulating a clear, specific, and legitimate reason unrelated to race by the standard enunciated in Batson, which the State failed to communicate. Id at 93.

The murder conviction of Petitioner Hockaday, therefore should be reversed because his right to a fair and unbiased trial was compromised by the State's exclusion of otherwise qualified jurors solely by reasons based on race.

ISSUE III:

The Petitioner in this case avers and asserts that the State improperly used prior Driving Under the Influence convictions

causing extreme prejudice to the Defendant's case. The Defendant did not testify. The State offered evidence of prior D.U.I. offenses in an attempt to show that the Defendant was "reckless". The use of these prior convictions was extremely prejudicial to the Defendant, strongly outweighing any possible probative value or relevance to the State. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. "The admissibility of such evidence of prior crimes has an almost irreversible impact upon the minds of the jurors." McElroy, § 69.01 (1).

The objection to the admissibility was made by Mr. McInturf in the following excerpt:

> The Court: Okay, Now, is there anything further you want to add?
>
> Mr. McInturf: We're going to object to that, Your Honor. That's simply contempt upon the State's part to show the pattern of behavior, past bad acts. He needs to prove the act in question. We think it's not admissible and we ask and make an oral Motion in Limine. He does have case law but we do not agree with that whatsoever. We think it would unduly prejudice the Defendant. We would in no way receive a fair trial, Your Honor. If he testified we agreed–Mr. Hillman–if he does not–
>
> Mr. Hillman: I think it's shown the State as part of the prosecution and in its case in chief can produce prior DUIs to show this act was, in fact, reckless.
>
> Mr. McInturf: He had knowledge it was reckless because he had done it before.
>
> The Court: Get you to read that.
>
> Mr. Hillman: Crosswell was the case I was mentioning about prior arrests.
>
> Mr. McInturf: Please the Court, Your Honor, this goes to a relevant, consistent pattern of reckless conduct. There is none involved with

Mr. Hockaday other than driving while revoked.
Mr. Hillman: I'm not going to introduce the one in '82, the one in '85, '89 and '93. There have been court decisions that say I can't go past eleven years. But the past seven years of convictions–a seven-year-old is fine. And we're using it as a pattern of this defendant to engage in this kind of conduct and he knows it's reckless.
The Court: I'm going to permit you to do that, but then again, of course, you know you are really running the risk if you don't tie it in of having a mistrial. (R. 178)

The State is required to prove recklessness as an element of this offense under Ala. Code § 13A-6-2(a)(2). Instead, the State relied on prior incidents to suggest to the jury that Petitioner Hockaday was guilty of the alleged murder because of past actions and character. The Petitioner contends that a D.U.I. charge and conviction is not analogous to the charge of reckless murder, nor is any element of D.U.I the same as any element of reckless murder. That the Defendant engaged in reckless conduct to prove murder cannot be shown by his prior convictions for D.U.I., but rather should be shown that on the night that this alleged incident occurred he engaged in reckless behavior.

The prosecutor could have relied on the precedence of case law that purports that "reckless" intent can be shown through the behavior and that in bringing in evidence of the prior convictions was a ploy to prejudice the Defendant by prior bad acts. "As to a criminal defendant, Rule 403's term 'unfair prejudice' speaks to the capacity of some conceitedly relevant evidence to lure the fact finder into declaring guilt on an improper basis rather than on proof specific to the offense charged." Old Chief v United States, 519 U.S. 172 (1977)

The Petitioner then is due to have his murder conviction reversed because the evidence of prior convictions tends to show that he may abuse alcohol, but not that he engaged in behavior results in reckless murder. "In dealing with the specific problem raised ...and its prior conviction element there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad

character reasoning." Old Chief v United States, 519 U.S. 172 (1977)

ISSUE IV:

The Petitioner in the instant case avers and asserts that he was placed in double jeopardy in violation of his Constitutional rights. The Fifth Amendment and the Fourteenth Amendment of The United States Constitution provides for guarantees that the Defendant will not be tried and sentenced for the same offense twice. U. S. Constitution, 5th and 14th Am

The Defendant was cited and punished for driving while under the influence in violation of the Alabama State Code. The State introduced evidence of prior convictions to prove reckless intent. The introduction of the prior convictions of D.U.I., were not necessary to prove recklessness and were far more prejudicial than probative.

"The Court of Appeals, held that: (1) evidence that the defendant had voluntarily consumed [at least 18 cans of beer] prior to entering vehicle and attempting to drive establish 'willfulness' of actions and supported conviction...." United States v Loera, 923 F. 2d 725

By bringing in evidence of prior convictions of Driving while under the Influence and as the jury stated in a post verdict questionnaire, part of the return of the guilty verdict on the murder count was because of the admission into evidence of the prior convictions for driving offenses. The Defendant then, in essence is being re-convicted for crimes that he had committed in the past when the State could have provided sufficient evidence to provide the elements required for reckless intent based on the acts that fateful night. By entering into evidence his past convictions, under the guise of proving the required elements of recklessness, the State unduly biased the jury to impose a conviction that was established on past acts. The elements of prior conviction are dissimilar to the elements of the crime charged. The Defendant

was not convicted of the crime at issue during his trial, but rather was convicted due to unrelated crimes he had committed in the past. His convictions then invokes the double jeopardy clause because he is paying a second time for past unrelated driving offenses. "The Double Jeopardy Clause protects against the burdens incident to a second trial, and not just against the imposition of a second punishment. Moreover, a second conviction, even if it results in no greater sentence, is an impermissible punishment." Ball v United States, 470 U.S. 856, 865 (1985)

The jury convicted him on a murder charge based on his prior convictions for D.U.I., of which he had paid the sentences and fines imposed upon him. The Petitioner is placed in double jeopardy for convicting him on the evidence of prior acts, which can not and do not show that on December 11, 1993, the Defendant's state of mind was the same as it was on the dates of the prior convictions. The State used evidence tending to be more prejudicial than probative. The evidence tends to show that he that Petitioner was re-convicted for the same crime and therefore is entitled to have his conviction over turned.

ISSUE V:

The Petitioner avers and asserts that the State failed to establish that he had engaged in shocking, outrageous or especially heinous acts.

"What amounts to outrageous conduct, of course, is not easily defined". United States v Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed 2d 366 (1973). The definition in Rochin, states that: "Thus, our inquiry must not be 'ad hoc' and episodic but duly mindful of reconciling the needs both of continuity and of change in progressive society." . Again in Rochin, the Court explained, "....requires the courts to make a normative judgment, it is also important that we not apply our 'merely personal and private notions' and disregard the limits that

bind judges in their judicial function. " Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed 183 (1952)

The Court in Lewis, used the dictionary definitions of the words: "The element of cruelty involves the pain and the mental and physical distress visited upon the victims. 'Heinous' and 'depraved' involved the mental state of the perpetrator as reflexed in his words and actions. Heinous means hatefully or shocking evil; grossly bad; cruel means disposed to inflict pain esp. in a wanton, insensate or vindictive manner; sadistic; and 'depraved' marked by debasement, corruption, perversion, or deterioration." Lewis v United States, 497 US 764 (1990)

What amounts to extreme indifference depends on the circumstances of each case, but some shocking, outrageous conduct must be shown during the trial. "The term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile, "cruel" means pitiless, or designed to inflict a high degree of pain utter indifference to, or enjoyment of the suffering of others." Cartwright v Maynard, 498 US 1,3, 822 F. 2d 1477, 1488...

The circumstances and actions of the Petitioner in the case at bar, do not rise to heinous, outrageous acts and the State did not prove that it did. It is for this reason
that the conviction in this case should be overturned and the Petitioner is afforded a fair trial.

ISSUE VI:

The Petitioner in this case avers and asserts that the State failed to prove it's case because of the missing links in the chain of custody on the blood samples taken from the Defendant.

Dr. Gerhardt drew a blood sample from the Defendant at 6:30 p.m. on December 12, 1993. The Doctor testified that he gave the blood sample to a nurse standing nearby, whose identity was unknown to the Doctor. Nurse Pam Woodruff, the nurse on duty, testified that she did not know how she obtained the blood

sample, or whether she was handed the sample or picked it up in the emergency room. The blood test was completed at 7:01p.m. by Laboratory Technician Mullins, who also testified that she was unsure of how she received the sample in question. (R. 473) The State can not be sure with the missing links, that the blood sample taken from the Defendant was the same sample tested by the laboratory technician.

The State attempted to show that the chain of custody was established through the testimony of Trooper Morrison. Morrison testified that, while standing in the door way of the trauma room, he observed Dr. Gerhardt draw the blood, hand it to Nurse Rogers, who then handed it to Nurse Kimbrough, who then placed the sample in the chute, where it would have been received by the laboratory. However, the technician testified that she could not remember if the sample had come through the chute. (R. 475) There was further testimony that Officer Morrison arrived at Carraway Hospital between 7: and 7:15 pm, this fact then would negate his prior testimony on observing the chain of custody of the blood sample and
gives rise to the credibility of the witness. This chain of custody of evidence put on by the State which led to Petitioner Hockaday's conviction would not hold up under the Daubert standard and the subsequent case law which in part states:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stage is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Daubert v Dow Chemical, 509 U.S. 579 (1993),

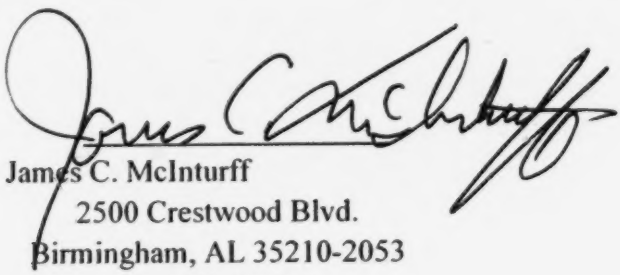
The State relied on one sample purporting to be from the Defendant, as testified to by Officer Morrison who arrived at the

hospital after the sample had been drawn and tested, thereby rendering his testimony ineffective as to the chain of custody.

When these established procedures are not followed, the defendant in trial has no fair defense to rebut the State's evidence. Therefore, the Petitioner is not able to rely upon the State's evidence as being scientifically sound or holding up under empirical standards and his conviction should be overturned.

CONCLUSION

It is for the aforementioned reasons that Petitioner Hockaday was deprived of his fundamental rights as a citizen of the United States and prays that this Honorable Court grant review of his case as justice demands.



James C. McInturff
2500 Crestwood Blvd.
Birmingham, AL 35210-2053
205-951-1970

APPENDIX

IN THE SUPREME COURT OF ALABAMA

February 7, 1997

1960242

Ex parte Scotty Dale Hockaday. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Scotty Dale Hockaday v State) (94-1948) (Shelby: CC-94-245)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

ALMON, J.- Hooper, CJ., Houston, Kennedy and Butts, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same apear(s) of record in said Court.
Witness my hand this 7th day of Feb, 1997.

s/ Robert Esdale
Clerk, Supreme Court of Alabama

Court of Criminal Appeals
State of Alabama
Judicial Building, 300 Dexter Avenue
P.O. Box 301555
Montgomery, AL 36130-1555

SAM TAYLOR
Presiding Judge
JOHN PATTERSON
H.WARD MCMILLAN
FRANCIS ALLEN LONG, SR.
SUE BELL COBB
Judges

Clerk's Office
334-242-4590

CR-94-1948 Shelby Circuit Court
(CC-94-245)

Scotty Dale Hockaday v. State

Affirmed by memorandum.

The appellant's argument, that the trial court erred in denying his motion to exhume the victim's body based upon the State's failure to provide him with potentially exculpatory evidence, in violation of Brady v Maryland, 373 U.S. 83 (1963), is without merit. The appellant failed to prove that the State suppressed any evidence and that an autopsy would be material to the case.

The appellant's argument, that the trial court erred in denying his Batson motion on grounds that the State exercised two of its peremptory challenges in a racially discriminatory manner, is without merit. Because the appellant failed to present any evidence of a desultory voir dire or disparate treatment among the veniremembers, the trial court's denial of hte motion was not

erroneous.

The appellant's argument , that the trial court abused its discretion in admitting records of his prior convictions for driving under the influence as evidence of recklessness, is without merit based upon the authority of Crauswell v. State, 638 so. 2d 11 (Ala. Cr. App. 1993).

The appellant's argument, that the State acted improperly in displaying folders marked "DUI murder" to the jury, is without merit because the appellant failed to establish that he was prejudiced by the display.

The appellant's argument, that he was subjected to double jeopardy when he was convicted of reckless murder after his driver's license was administratively revoked for the same conduct, is without merit. The revocation for the appellant's license was remedial in
nature and was not imposed as a second punishment or retribution for the underlying conviction of reckless murder.

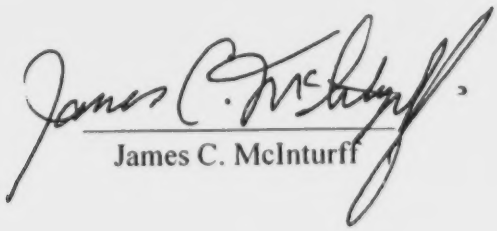
The appellant's argument that the State presented insufficient evidence to sustain his reckless murder conviction is without merit. There was ample evidence presented by the State which, if believed by the jury, would sustain the verdict of guilt.

The appellant's argument, that there was a "missing link" in the chain of custody of the blood sample taken from him, is without merit. The combination of direct and circumstantial evidence reveals that the State established an adequate chain of custody. Harrison v State, 650 So.2d 603 (Ala. Cr. App. 1994).

All judges concur.

CERTIFICATE OF SERVICE

I, certify that I have served a true and correct copy of the above Petition For the Writ of Certiorari, by placing the same in the United States Mail, postage prepaid and properly address to the Honorable William Pryor, Attorney General for the State of Alabama, 11 South Union Street, Alabama State House, Montgomery, Alabama 36130, and to the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, on this the 20th day of October, 1999.



James C. McInturff